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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

BRIAN BARKER MALE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

BRIAN BARKER MALE, petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Florida entered in the above entitled case on February 8, 1967.

CITATIONS TO OPINION BELOW

The original opinion of the Florida Supreme Court dated February 8, 1967, affirming petitioner's conviction is unreported and attached as Appendix A hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Florida was entered on February 8, 1967. The juris-

diction of this Court is invoked under 20 U.S.C., Section 1257 (1)(3) since the right of the petitioner to due process of law under Amendment XIV to the Constitution of the United States was denied him below.

HOW CONSTITUTIONAL QUESTION IS RAISED

At the time of trial, petitioner moved that the alleged statement made to the interrogating police officer be suppressed. (R. 48-49)

The motion was denied. (R. 49)

The Constitutional issues were explicitly raised by petitioner in his writ of certiorari to the District Court of Appeal, Third District, State of Florida, a copy of the opinion being attached hereto as Appendix B, and a copy of the Petition for Rehearing being attached hereto as Appendix C. The Supreme Court of Florida assumed in its decision without opinion that the Constitutional questions were not properly before it as evidenced by its denial of the petition.

QUESTIONS PRESENTED

1. The critical question in this case is whether under the totality of circumstances the continued questioning of the accused after the accused has been placed under arrest and after the accused has called his attorney, but before his attorney has arrived to assist him, is such a refusal as to constitute a denial of the due process of law as is guaranteed by the Constitution of the United States, Amendment XIV.

2. Whether the due process of law was denied the petitioner by the lower court allowing testimony against the petitioner at the time of trial, which testimony was obtained from the petitioner by the arresting officer while the petitioner was in police custody and after his request to consult with his attorney.

CONSTITUTIONAL PROVISION INVOLVED

The applicable Constitutional provision involved is Amendment XIV, Section I, which reads, in material part, as follows:

> "...nor shall any state deprive any person of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

The petitioner, Brian Barker Male, was arrested in Miami, Florida, on July 27, 1964, at his place of employment, Bayshore Veterinary clinic at 1093 N. E. 79th Street by police Sgt. Leonard of the Dade County Sheriff's Department. (R. 53) Officer Leonard was accompanied to the petitioner's place of employment by Officer Hillman, a technician with the Dade County Sheriff's Department, who remained outside the Clinic in a police car. (R. 52) Officer Leonard had a portable microphone in his pocket which was electronically connected to equipment in the police car that technician Hillman was manning for the purpose of recording any admissions or statements made by the petitioner prior to his arrest. (R. 52) No testimony was adduced at the time of trial from any State's witness regarding any taped admission or statement made

by the petitioner; and in truth and in fact the only arresting officer to testify at the time of trial was Officer Leonard. (R. 1A)

The petitioner, after his arrest, was taken to the Homicide Office of the Public Safety Building at 1320 N. W. 14th Street, Miami, Florida. (R. 53) The arresting officer, Sgt. Leonard, allegedly advised the petitioner that anything he said would have to be freely and voluntarily given and that it could be used against him, and that he was entitled to have an attorney present. (R. 54)

According to Sgt. Leonard, after 15 or 20 minutes of interrogation of the petitioner, the petitioner decided he wanted an attorney. (R. 55) The alleged statement was made by the petitioner in the presence of Sgt. Leonard and Lt. Jerry Evans of the Sheriff's Office, (R. 45) but Lt. Evans who was present at the time of trial did not testify. This alleged statement by the petitioner was presumably made between the time the petitioner contacted his attorney and the time the attorney arrived at the Homicide Office some 10 minutes thereafter. (R. .47)

Upon examination by petitioner's counsel, Sgt. Leonard responded to these questions:

Question: "Why didn't you wait until Mr. Vining (petitioner's counsel) got there? Why did you talk to him before?"

Answer: "Because we were trying to obtain a confession." (R. 47)

Question: "Did he ask for an attorney?"
Answer: "Yes, he did." (R. 47)

Question: "Prior to the time that he made any statement?"
Answer: "Prior to the time that he made any statement at all, he asked for an attorney. I believe we discussed the case first and he probably felt he was getting involved more and he felt — he requested an attorney."

At trial, petitioner's objection to the admission of his statement in evidence was likewise overruled. (R. 49)

REASONS FOR GRANTING THE WRIT

The factual complex of the instant case raises the vitally important Constitutional issue of the permissible limits to which law enforcement officers may go before they transgress the inalienable rights to due process guaranteed to all accused. This is in direct conflict with the well established priniciples as previously announced by this Court.

Beginning with the decision of **Gideon vs Wainwright**, reported at 372 US 335, 9 L ed 2d, 799, 83 S Ct 792, 93 ALR 2d, 733, the Supreme Court of the United States has taken particular interest in the plight of the accused under criminal prosecutions dealing with confessions written or oral or admissions against interest. In the Gideon case, the Supreme Court held that the provision in the Sixth Amendment of the United States Constitution, that in all criminal prosecutions the accused shall enjoy the

right to have assistance of counsel for his defense, requires that in Federal Courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. This decision was rendered on March 18, 1963.

Following on the footsteps of the Gideon case, comes **Winston Massiah**, petitioner, vs **United States**, as reported at 377 US 201, 12 L ed 2d 246, 84 S Ct 1199, which was decided on May 18, 1964, and held that, under the Federal Constitution, any secret interrogation of the defendant from and after the filing of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with a crime. The Massiah case further held that, during the period from the time of the arraignment until the beginning of the trial, when consultation, thoroughgoing investigation, and preparation are vitally important, defendants are as much entitled to aid of counsel as at the trial itself.

On June 22, 1964, the Supreme Court of the United States, in **Danny Escobedo**, petitioner, vs **Illinois**, reported at 378 US 478, 12 L ed 2d 977, 84 S Ct 1758, held:

> "The accused in a state prosecution is denied the assistance of counsel in violation of the Sixth Amendment to the Constitution as made obligatory upon the states by the Fourteenth Amendment, and no pretrial statement elicited by the police during interrogation may be used against him at a criminal trial, where the police investigation, conducted prior to indictment, is no

> longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent."

By these decisions, it clearly appears that the Supreme Court has extended and moved back in time the necessity of the State providing the accused with counsel from time of trial in the Gideon case, to the time for indictment in the Massiah case, to the time "when the police investigation, conducted prior to indictment, is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect, (as in the instant case) the suspect has been taken into police custody, and the police carry out a process of interrogation that lends itself to eliciting incriminating statements . . .".

Judge Goldberg in this latter decision said in majority opinion the following:

> "It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly, because most confessions are obtained during the period between arrest and indictment, and 'any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances'.

Watts v Indiana, 338 US 49, 59, 93 L ed 1801, 1809, 69 S Ct 1347 (Jackson, J., concurring in part and dissenting in part). This argument, of course, cuts two ways. The fact that many confessions are obtained during this period points up its critical nature as a 'stage when legal aid and advice' are surely needed. Massiah v United States, supra 377 US at 204, 12 L ed 2d at 249. Hamilton v Alabama, supra; White v Maryland, supra. The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination. See Note. 73 Yale LJ 1000, 1048-1051 (1964).

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement

*(378 US 489)

*which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said;

'(A) ny system of administration which permits the prosecution to trust habitually to compulsory

self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer, —that is, a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.' 8 Wigmore, Evidence (3d ed. 1940), 309 (Emphasis in original)

*(378 US 490)

*This court also has recognized that 'history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence...'. Haynes v Washington, 373, US 503, 519, 10 L ed 2d 513, 524, 83 S Ct 1336.

We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have

to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." (Emphasis in original)

Williams v State of Florida, 188 So 2d 320, decided by the District Court of Appeal, Second District on June 24, 1966, held that where police officers knowing that the defendant had been in jail for three weeks, had already been indicted for the crime, and had a lawyer, took the defendant out of his jail cell, transported him to a small room, closed the door and thereafter obtained a confession from him, **the confession thus obtained was inadmissible even though the defendant had not in terms demanded his lawyer be present.** (Emphasis supplied)

The case further holds that the Constitutional right to counsel does not arise from a mere request for counsel, but from advent of an accusatory stage of proceedings against the defendant, U.S.C.A. Constitutional Amendment Six.

Much of the confusion arising from the Escobedo decision was clarified by the United States Supreme Court in its recent decision of Ernesto A. Miranda, Petitioner, vs The State of Arizona, et al, reported at 86 Sup.Ct. Reporter 1602, (1966). Among numerous declarations, the Supreme Court of the United States, in this decision, held the following:

"'Custodial interrogation', within rule limiting

admissibility of statements stemming from such interrogation, means questioning initiated by law enforcement officers after person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

There can be no questioning if defendant indicates in any manner and at any stage of interrogation process that he wishes to consult with attorney before speaking.

Mere fact that accused may have answered some questions or volunteered some statements on his own does not deprive him of right to refrain from answering any further inquiries until he has consulted with attorney and thereafter consents to be questioned.

Right to have counsel present at interrogation is indispensable to protection of Fifth Amendment privilege.

Need for counsel to protect Fifth Amendment privilege comprehends not merely right to consult with counsel prior to questioning but also to have counsel present during any questioning if defendant so desires.

If individual states that he wants attorney, interrogation must cease until attorney is present; at that time, individual must have opportunity to confer with attorney and to have him present during any subsequent questioning." (Emphasis supplied)

It is respectfully submitted that, especially in view of the following factors, the Florida Court's decision is in error and announces a doctrine wholly in conflict with the rights of any accused to due process.

1. Petitioner, upon his arrival at the police station, requested to be allowed to consult with his attorney.

2. His attorney arrived at the station within 10 minutes and saw the petitioner.

3. Petitioner's alleged confession had already been obtained by the interrogating officer between the time the petitioner phoned his attorney and the arrival of his attorney.

4. Petitioner's request was to have his attorney present during the interrogation and to have the opportunity of private consultation at this critical time.

5. Petitioner needed specific legal advice at this critical time.

Accordingly, the present case presents a gross example of the agents of the State violating their own laws in an attempt to obtain a confession regardless of the means.

It is extremely interesting to note that two police officers, armed with a transmitter and wired for sound for the purpose of taping the conversation of the officer and the accused (R. 52) were unable to produce either recorded testimony or recorded evidence of an admission or confession at the time of trial; and further that after

the defendant was arrested and had in fact called his lawyer, that Officer Leonard was able to "freely and voluntarily" elicit a confession of guilt from the petitioner, which testimony stands alone before the trial court and uncorroborated by either Officer Hillman who was present at the time of arrest and transportation to the Homicide Office, or Officer Evans who was present at the time the alleged statement was made, both of whom were present at time of trial and who did not testify. (R. 52). Still further that, upon cross examination, Officer Leonard (R. 55, 60 and 61) testified in response to questions concerning the exact words used by the defendant, which were alleged to be his sole confession or admission, and although the defendant made only one statement, Officer Leonard gave four different variations of the statement when he related that the defendant said (R. 55),(A) "He said—he advised he was the one that committed the abortion"; (R. 55) (b) "Well, I asked him had he committed this abortion, and he stated he had."; (R. 60) (c) "Among other questions that I asked him, I asked him if he had performed this abortion, and he said he did."; (R. 61) (d) "That he was the one".

From the foregoing it is manifest that, within the principles heretofore enunciated by this Court, the alleged statement of the petitioner was inadmissible in evidence. The gross miscarriage of justice resulting from the decisions reached by the courts of Florida, which decisions are in conflict with the Constitution of the United States and the opinions of this Court, should not be allowed to stand as an incorrect guidepost for the administration of justice in the courts of the land.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

EDWARD C. VINING, JR. and
JACK H. EAKLE
Counsel for Petitioner
827 Ingraham Building
Miami, Florida 33131

APPENDIX A

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A.D. 1967

WEDNESDAY, FEBRUARY 8, 1967

BRIAN BARKER MALE, Petitioner,	**	
vs.	**	CASE NO. 35,865
STATE OF FLORIDA, Respondent.	**	

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Third District of Florida, in said cause bearing date July 19, 1966, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy

TEST:

/s/ Sid J. White
Sid J. White
Clerk Supreme Court

CC: Hon. W. P. Carter
Hon. J. F. McCracken
Hon. Edward C. Vining, Jr.; Hon. Jack H. Eakle
Hon. Wallace E. Allbritton

APPENDIX B

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1966

BRIAN BARKER MALE,	**	
Appellant,	**	
vs.	**	CASE NO. 65-567
THE STATE OF FLORIDA,	**	
Appellee.	**	

Opinion filed July 19, 1966.

An Appeal from the Criminal Court of Record for Dade County, Gene Williams, Judge.

Edward C. Vining, Jr.; Jack H. Eakle, for appellant.

Earl Faircloth, Attorney General, and Herbert P. Benn, First Assistant Attorney General, for appellee.

Before PEARSON, CARROLL and BARKDULL, JJ.

PER CURIAM.

The only substantial question presented on this appeal is whether or not the defendant was denied his constitutional right to counsel under the decision of the United States Supreme Court in Escobedo v. Illinois, 378 U. S. 478, 12 L.Ed.2d 977, 84 S.Ct. 203.

The pertinent sequence of events leading to the defendant's confession is as follows: (1) Defendant was placed under arrest at his place of employment and transported to the homicide office of the Public Safety Department; (2) he was advised that if he talked about any aspect of the case he would have to do so freely and voluntarily; (3) the accused requested permission to contact his attorney and permission was granted; (4) after he had contacted his attorney, the defendant implicated himself by confessing that he was one of those who participated in the crime.

On this appeal, it is urged that, having been allowed to communicate with his attorney, the examination should have ceased until the attorney arrived. We are unable to subscribe to such a rule, and we do not find it implicit in the Escobedo decision.

From the record before us, it is apparent that the appellant made his statement freely and voluntarily after consultation with his attorney. The record does not reveal whether appellant's attorney advised him to confess or to remain silent until a later time. The intention of the attorney to consult with the appellant again is not important in view of the fact that the appellant voluntarily confessed when he knew he had a right to await his attorney if he wished to do so. Cf. Montgomery v. State, Fla. 1965, 176 So.2d 331.

Affirmed.

BARKDULL, Judge (dissenting).

I respectfully dissent from the majority opinion. It appears that the interrogation of the appellant continued while the counsel he had contacted was on the way to the police station. The alleged confession was obtained while the police officers and the appellant were awaiting the arrival of the attorney. I would hold that the cause is governed by Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 203, 12 L.ed.2d 977, and grant a new trial.

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1966
WEDNESDAY, SEPTEMBER 14, 1966

BRIAN BARKER MALE,	**	
Appellant,	**	
vs.	**	CASE NO. 65-567
THE STATE OF FLORIDA,	**	
Appellee.	**	

Counsel for appellant having filed in this cause petition for rehearing and amended petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition as amended, is hereby denied.

A True Copy
ATTEST:
William P. Carter
Clerk District Court of
Appeal, Third District

cc: Edward C. Vining, Jr.
Jack H. Eakle
Herbert P. Benn
J. F. McCracken
/h

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS BEEN ISSUED AND MAILED TO THE CLERK OF THE CRIMINAL COURT OF RECORD FOR DADE COUNTY, FLORIDA)